

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DAVID JESSE BROWN,

Plaintiff,

v.

WASHINGTON STATE UNIVERSITY, et  
al.,

Defendants.

No. CV-11-0079-EFS

**ORDER GRANTING SUMMARY JUDGMENT  
AND CLOSING FILE**

Before the Court, without oral argument, is Defendants Washington State University, David Sprott, Cheryl Oliver, Laura Thomie, Christian Wuthrich, Lisa McIntyre, Wayne Popeski, Edwin Hamada, Anita Cory, Melinda Huskey, Danielle Hess, Howard Grimes, Ralph Jenks, Monte Griffen, Linda Nelson, Lori Wiest, Sung K. Ahn, Bernard Wong on Wing, Susan He, Kenneth Butterfield, Babu John Mariadoss, Harry Turtle, Yany Gregoire, Robert Greenberg, K.D. Joshi, Charles Munson, Mike Dodd, Ashley Fagerlie, Caitlin MacKay, Evan Huri, Sean Falcon, and Josh Hart's (collectively, the "WSU Defendants") Motion for Summary Judgment, ECF No. 58. Plaintiff David Jesse Brown has not filed any opposition to the motion. Having reviewed the pleadings, the record in this matter, and applicable authority, the Court is fully informed. For the reasons set forth below, the Court grants the WSU Defendants' motion.

1 **A. Background<sup>1</sup>**

2 In 2010, Plaintiff was suspended from the Masters in Business  
3 Administration degree program at Washington State University (WSU),  
4 and he was excluded from campus for violation of the Student Conduct  
5 Code. WSU later terminated Plaintiff's enrollment for failure to meet  
6 minimum academic standards.

7 Plaintiff appealed these decisions to the University, Whitman  
8 County Superior Court, and the Washington Court of Appeals. WSU's  
9 decisions to suspend Plaintiff, exclude him from campus, and terminate  
10 his enrollment, were affirmed at all levels of review. Plaintiff has  
11 since brought the instant action *pro se*, alleging a variety of federal  
12 causes of action. Plaintiff's principal contention is that WSU's  
13 actions resulted from a conspiracy of students, faculty,  
14 administrators, and others to discriminate against him and deprive him  
15 of his civil rights because he is Jewish.

16 The Court's Amended Scheduling Order, issued April 11, 2012, ECF  
17 No. 56, set forth a number of mandatory deadlines and discovery-  
18 related obligations. In particular, the parties were directed to  
19 exchange Federal Rule of Civil Procedure 26(a)(1) material by June 1,  
20 2012, *id.* at 1; additionally, the parties were directed to identify  
21 expert witnesses and provide Rule 26(a)(1) reports by September 25,

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22 <sup>1</sup> When considering these motions and drafting this background section, the  
23 Court viewed all evidence and drew all justifiable inferences therefrom  
24 in Plaintiff's favor and did not weigh the evidence, assess credibility,  
25 or accept assertions made by Defendants that were contradicted by the  
26 record. See *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Anderson v.*  
*Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1 2012 (for Plaintiff) or October 25, 2012 (for Defendants), *id.* at 2.  
2 The Court instructed the parties to complete all discovery by January  
3 2, 2013, and to each file a notice of to-be-adjudicated claims and  
4 affirmative defenses by January 9, 2013. *Id.* at 3-4.

5 The WSU Defendants filed their notice, as directed, on January  
6 9, 2013. ECF No. 57. In that notice, the WSU Defendants represent  
7 that Plaintiff "provided no Rule 26(a) disclosures, disclosed no  
8 expert witnesses, initiated no discovery, and has undertaken no action  
9 to pursue or prosecute his claims." *Id.* at 1. Plaintiff did not file  
10 his notice as directed.

11 On January 15, 2013, the WSU Defendants moved for summary  
12 judgment. ECF No. 58. In their accompanying memorandum, the WSU  
13 Defendants identify a number of bases upon which the Court could grant  
14 summary judgment, including the following: a) the suit is an  
15 impermissible collateral attack on a state-court judgment, b) the suit  
16 is barred under the *Rooker-Feldman* doctrine, c) a number of the  
17 individual WSU Defendants are not state actors, d) the WSU Defendants  
18 sued in their official capacities are not persons under 42 U.S.C. §  
19 1983, and e) claims against certain WSU Defendants sued in their  
20 official capacities are barred by the 11th Amendment. ECF No. 59, at  
21 14-16. However, the principal argument advanced by the WSU Defendants  
22 is that Plaintiff has failed to engage in discovery and has  
23 essentially abandoned his lawsuit - and in so doing, Plaintiff has  
24 failed to produce a shred of evidence to support any of his claims.  
25 *Id.* at 8-13. Plaintiff did not file any memorandum opposing the WSU  
26 Defendants' motion.

1 **B. Legal Standard**

2 Summary judgment is appropriate if the record establishes "no  
3 genuine dispute as to any material fact and the movant is entitled to  
4 judgment as a matter of law." Fed. R. Civ. P. 56(a). A party is  
5 entitled to summary judgment when the pleadings, depositions, answers  
6 to interrogatories and admissions on file, together with the  
7 affidavits, if any, show that there is no genuine material issue of  
8 fact and that the moving party is entitled to judgment as a matter of  
9 law. *Id.* 56(c). A "mere scintilla of evidence" in support of the  
10 non-moving party's position is not sufficient to withstand summary  
11 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).  
12 The non-moving party may not rest on mere allegations or denials of  
13 his pleadings, and must go beyond the pleadings to designate specific  
14 facts showing that there are genuine factual issues that "can be  
15 resolved only by a finder of fact because they may reasonably be  
16 resolved in favor of either party." *Id.* at 250. The party opposing  
17 summary judgment must point to specific facts establishing a genuine  
18 material issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S.  
19 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
20 475 U.S. 574, 586-587 (1986).

21 Facts relied on in opposition to summary judgment must be  
22 supported by the record and the court should "not give credence to  
23 empty rhetoric . . . but credit[s] only those assertions that are  
24 supported by materials of evidentiary quality." *In re Mailman Steam*  
25 *Carpet Cleaning Corp.*, 196 F.3d 1, 2 (1st Cir. 1999). The Court is  
26 not required to draw any unreasonable inference or accept conclusory

1 allegations as "conclusory or speculative testimony is insufficient to  
2 raise a genuine issue of fact to defeat summary judgment." *Anheuser-*  
3 *Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 345 (9th  
4 Cir. 1995).

5 One of the principal purposes of the summary judgment rule is to  
6 isolate and dispose of factually unsupported claims or defenses.  
7 Therefore, when the non-moving party bears the burden of proof at  
8 trial, summary judgment should be granted if, after adequate time for  
9 discovery, the non-moving party fails to make an evidentiary showing  
10 sufficient to establish the existence of an element essential to the  
11 case. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex*, 477  
12 U.S. at 322-323. "In such a situation, there can be 'no genuine issue  
13 as to any material fact,' since a complete failure of proof concerning  
14 an essential element of the nonmoving party's case necessarily renders  
15 all other facts immaterial." *Celotex*, 477 U.S. at 323-324.

#### 16 **C. Discussion**

17 In ruling on the instant motion, the Court need look no further  
18 than Plaintiff's failure to file a memorandum opposing the motion.  
19 Local Rule 7.1 sets forth the parties' obligations to file memoranda,  
20 and the consequences of failing to do so:

21 A failure to timely file a memorandum of points and  
22 authorities in support of or in opposition to any motion  
23 may be considered by the Court as consent on the part of  
the party failing to file such memorandum to the entry of  
an Order adverse to the party in default.

24 LR 7.1(e).

25 Although the silence-equals-consent rule set forth in Local Rule  
26 7.1(e) is permissive, not mandatory, the Court is persuaded that the

1 rule should apply here. The WSU Defendants' uncontested assertions  
2 about Plaintiff's failure to engage in any discovery, see ECF No. 57,  
3 as well as Plaintiff's failure to file a notice of to-be-adjudicated  
4 claims, provides ample evidence that Plaintiff no longer wishes to  
5 pursue this case. Accordingly, the Court treats Plaintiff's failure  
6 to file a memorandum opposing the instant summary-judgment motion as  
7 "consent . . . to the entry of an Order adverse" to Plaintiff. LR  
8 7.1(e). On this basis alone, the WSU Defendants' motion is granted.

9 Alternatively, the Court also finds a sufficient basis to grant  
10 the WSU Defendants' summary-judgment motion on substantive grounds.  
11 Case law is clear: at summary judgment, Plaintiff may not rely on his  
12 pleadings; he must produce substantial evidence to support his claims.  
13 *Nebraska*, 507 U.S. at 590; *Celotex*, 477 U.S. at 322-323. Other than  
14 an actual trial, summary judgment is the penultimate "show 'em or fold  
15 'em" moment in civil litigation. Plaintiff has opted for the latter;  
16 he has not offered any evidence in opposition to the instant motion.  
17 He has failed to meet his burden of demonstrating that a genuine issue  
18 of material fact warrants further proceedings in this case. Fed. R.  
19 Civ. P. 56(a). Accordingly, the WSU Defendants are entitled to  
20 summary judgment on this basis as well.

21 Other than the WSU Defendants, the only remaining Defendant  
22 identified by Plaintiff is Defendant Roger Sandberg. On August 3,  
23 2011, the Court directed Plaintiff to provide an address, a summons,  
24 and a USM-285 form to enable the U.S. Marshals to serve Mr. Sandberg.  
25 ECF No. 35, at 3. The Court cautioned Plaintiff that he was required  
26 to submit the additional material by no later than September 6, 2011,

1 and that a "failure to submit these completed documents will result in  
2 dismissal of Mr. [Sandberg]." *Id.* As the Court noted in its  
3 September 7, 2011 Order, Plaintiff failed to submit these documents.  
4 ECF No. 37. Moreover, Plaintiff has now benefitted from an additional  
5 eighteen months in which to correct the oversight. He has not done  
6 so. The Court therefore dismisses Plaintiff's claims against  
7 Defendant Sandberg for failure to prosecute.

8 **D. Conclusion**

9 Accordingly, **IT IS HEREBY ORDERED:**

- 10 1. The WSU Defendants' Motion for Summary Judgment, **ECF No.**  
11 **58**, is **GRANTED**. Plaintiff's claims against the WSU  
12 Defendants are **DISMISSED**.
- 13 2. Plaintiff's claims against Defendant Roger Sandberg are  
14 **DISMISSED** for lack of prosecution.
- 15 3. The Clerk's Office is directed to **ENTER JUDGMENT** in favor  
16 of the WSU Defendants and Defendant Roger Sandberg.
- 17 4. All pending deadlines and hearings are **STRICKEN**.
- 18 5. As no further Defendants have been identified or served in  
19 this action, and as all claims against all identified and  
20 served Defendants have now been dismissed, the Clerk's  
21 Office is directed to **CLOSE** this file.

22 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
23 Order and provide copies to all counsel.

24 **DATED** this 11<sup>th</sup> day of March 2013.

25 s/ Edward F. Shea  
EDWARD F. SHEA  
26 Senior United States District Judge